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March 15, 2001

**VIA HAND DELIVERY**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

**Re: MM Docket No. 00-39  
Thomson Multimedia, Inc.'s, Petition for Partial Reconsideration**

Dear Ms. Salas:

Enclosed for filing please find the original and eleven (11) copies of a Petition for Partial Reconsideration in the above-referenced docket.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,

*Lawrence R. Sidman*

Lawrence R. Sidman

Enclosures

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MAR 15 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Review of the Commission's  
Rules and Policies  
Affecting the Conversion  
To Digital Television

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MM Docket No. 00-39

**PETITION FOR PARTIAL RECONSIDERATION**

Thomson Multimedia, Inc. ("Thomson"), by its attorneys and pursuant to Section 1.429(d) of the Commission's rules, 47 C.F.R. § 1.429(d), hereby files this Petition for Partial Reconsideration of the Commission's *Report and Order*<sup>1</sup> in the above-captioned proceeding. Specifically, Thomson asks the Commission to reconsider its determination that the All-Channel Receiver Act ("ACRA")<sup>2</sup> grants it the authority to require that television receivers be capable of adequately receiving digital television ("DTV") broadcast signals.

In addition, Thomson fully supports the Petition for Reconsideration filed by the Consumer Electronics Association ("CEA") in this docket, as it pertains both to ACRA and Program and System Information Protocol ("PSIP") information. Thomson agrees with CEA that the Commission's decision, while recognizing the indispensability of channel tuning information, fails to ensure that consumers will be able to tune their DTV receivers without confusion. The easiest way to accomplish this goal is for the Commission to adopt ATSC Doc. A/65A (dated March 29, 2000). At a minimum, however, the FCC must require that all PSIP tables necessary for communicating program selection information are transmitted.

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<sup>1</sup> *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report and Order* in MM Docket No. 00-39, FCC 01-24 (rel Jan. 19, 2001).

<sup>2</sup> All-Channel Receiver Act of 1962, P.L. 87-529, 76 Stat. 150 (codified at 47 U.S.C. §303(s)).

## I. INTRODUCTION AND SUMMARY.

Although the *Report and Order* contains a number of determinations which should help propel the nation's transition to DTV -- most particularly, the reaffirmation of the 8-VSB modulation standard -- the *Report and Order* is regressive in other important respects. Thomson is particularly concerned by the Commission's conclusion that ACRA -- a law enacted by the Congress in 1962, approximately thirty years before the invention of digital television -- grants the Commission authority to require that television receivers be capable of adequately receiving DTV broadcast signals. Commissioner Furchtgott-Roth's dissent from even issuing a *FNPRM* regarding a DTV tuner mandate makes clear the mistaken nature of the Commission's ruling concerning its legal authority, and the Commission should reconsider its erroneous conclusion of law.

The Commission's only detailed discussion of the DTV tuner mandate appears in the *FNPRM* where the Commission states: "a plain language reading of [ACRA] does not limit our authority to analog television receivers, nor does it limit our authority to channels in the UHF band."<sup>3</sup> It thus appears that the Commission, somewhere in the penumbræ of the *Report and Order*, concluded that ACRA grants it the authority to require DTV tuners in all receivers. The Commission may wish to consider the issue of its legal authority in the context of the *FNPRM*. Thomson, however, is filing this Petition for Partial Reconsideration now because were the Commission to reconsider and reverse on the issue of legal authority, it would not and could not even consider the Comments to be filed in response to the *FNPRM*.<sup>4</sup>

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<sup>3</sup> *Further Notice of Proposed Rulemaking* at ¶ 110.

<sup>4</sup> Thomson, out of an abundance of caution, also wanted to avoid any possibility that a challenge to the legal authority underpinning the issuance of the *FNPRM* on the digital tuner mandate might be deemed untimely or waived if it was not asserted now in a Petition for Partial Reconsideration.

## II. THE COMMISSION LACKS AUTHORITY TO REQUIRE THAT TELEVISION RECEIVERS BE CAPABLE OF ADEQUATELY RECEIVING DIGITAL BROADCAST SIGNALS.

The Commission's conclusion that ACRA grants it the authority to impose a DTV tuner requirement is wrong as a matter of law.<sup>5</sup> It transcends the authority it derives from ACRA and departs from the Commission's prior treatment and interpretation of that statute. The Commission's legal error is exacerbated by the fact that the Commission offers no rationale or explanation for its conclusion that the once narrowly-construed ACRA is, nearly forty years after enactment, suddenly a broad mandate with far-reaching implications for a technology that was "mere science fiction" in 1962.<sup>6</sup>

### A. Congress Intended for ACRA To Address a Narrow and Specific Policy Goal.

In *Chevron U.S.A. v. Natural Resources Defense Council*, the Supreme Court stated that if the intent of Congress is clear, an agency "must give effect to the unambiguously expressed intent of Congress."<sup>7</sup> It is only in instances where Congressional intent is ambiguous that an agency may exercise its interpretive discretion.<sup>8</sup> Significantly, intent is not dependent on the plain language of a statute. *Chevron* makes clear that Congressional intent is determined by "employing traditional tools of statutory construction."<sup>9</sup> The United States Court of Appeals for the District of Columbia has adhered steadfastly to this precedent, and held that it is necessary to "exhaust the 'traditional tools of statutory construction.'"<sup>10</sup>

The Commission, in assessing Congressional intent and reaching the determination that ACRA grants it the authority to require that television receivers be capable of adequately receiving DTV

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<sup>5</sup> *Id.*; see also, *Further Notice of Proposed Rulemaking* at ¶ 110.

<sup>6</sup> *Report and Order* at p. 59 (Separate Statement of Commissioner Furchtgott-Roth).

<sup>7</sup> *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 843 n. 9.

<sup>10</sup> *National Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9).

broadcast signals, appears to focus exclusively on a single tool of statutory construction – the text of the statute. Once all of the traditional tools of statutory construction – examination of the statute's text, legislative history, structure, and purpose<sup>11</sup> – are applied to ACRA, however, it is indisputable that Commissioner Furchtgott-Roth, in his partial dissent to the *Report and Order*, was absolutely correct to question whether ACRA vests the Commission with the authority to require DTV tuners to be built in all television sets. The Commissioner stated succinctly: "This particular statute was conceived at a time when digital television was mere science fiction—Congress could not have had DTV technology in mind when it was considering this law."<sup>12</sup>

Thomson not only concurs with Commissioner Furchtgott-Roth, but submits that the tools of statutory construction – particularly legislative history and Congressional purpose – demonstrate that Congress unequivocally did not intend for ACRA to apply in the broad manner the Commission implicitly concludes it does in the *Report and Order*. Congress enacted ACRA in 1962 with the sole purpose of ensuring the viability of UHF broadcasting by requiring that all television receivers include the capability to receive all VHF and UHF channels.<sup>13</sup> The Senate Commerce Committee Report demonstrates clearly that ACRA's purpose is focused and does not touch upon the reception of digital signals. It states that "because of the nonavailability of television receivers which are capable of picking up *UHF signals* as well as VHF signals, the bulk of the *UHF band* is unused today . . . this legislation is designed to remedy this situation."<sup>14</sup> The Senate Report continues: the goal of UHF-VHF parity "would be achieved by eliminating the basic problem which lies at the heart of the *UHF-VHF* dilemma – the relative scarcity of television receivers in the United States which are capable of

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<sup>11</sup> See *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (citing *Southern California Edison Co. v. FERC*, 116 F.3d 507, 515 (D.C. Cir. 1997) and *First Nat'l Bank & Trust v. National Credit Union*, 90 F.3d 525, 529-30 (D.C. Cir. 1996)).

<sup>12</sup> *Report and Order* at p. 59 (Separate Statement of Commissioner Furchtgott-Roth).

<sup>13</sup> 47 U.S.C. § 303(s); see S. REP. NO. 87-1526, 2d Sess. (1962), reprinted in 1962 U.S.C.A.A.N. Vol. 1, 1873 ("Senate Report").

<sup>14</sup> Senate Report at 1874 (emphasis added).

receiving the signals of *UHF stations*.”<sup>15</sup> Ultimately, the legislation gives the FCC “certain regulatory authority to require that all television receivers . . . be equipped at the time of manufacture to receive all television channels. *That is, the 70 UHF and 12 VHF channels.*”<sup>16</sup>

Moreover, as CEA discussed extensively in its Reply Comments, in deliberating upon ACRA, Congress explicitly considered but rejected language that would have vested the Commission with broad authority.<sup>17</sup> The House Interstate and Foreign Commerce Committee dropped broader language which authorized the Commission to set “minimum performance standards,” and amended the bill that became ACRA for the specific purpose of ensuring that it was limited to ensuring reception of the UHF channels.<sup>18</sup>

CEA’s Reply Comments also note that, to assuage fears of Members of the Senate opposed to an overly broad grant of power to the Commission, the Senate Commerce Committee in its Report on the bill emphasized the Commission’s (specifically Chairman Minnow’s) promises that Commission regulation would be limited:

The FCC has assured us that the practical need for procuring authority which would permit effective enforcement of this legislation would not involve the Commission broadly in the dealing of television set manufacturers. *On the contrary, the Commission’s authority, restrictive as it would be of section 303(s), would be most limited and narrow.* On the basis of these representations, your committee agrees that the authority given to the Commission to require that all channel receivers “be capable of adequately receiving” UHF channels is narrow in scope and in the main consistent with what the House did in reporting its legislation.<sup>19</sup>

Thus, utilizing traditional tools of statutory construction, there is no question that Congress intended that ACRA be narrowly limited to solving a particular problem – receipt of UHF channels – which plagued the marketplace 40 years ago. That problem and Congress’ narrowly targeted solution,

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<sup>15</sup> *Id.* at 1875 (emphasis added).

<sup>16</sup> *Id.* at 1873 (emphasis added).

<sup>17</sup> See Reply Comments of CEA in MM Docket 00-39, at 6-9 (filed June 16, 2000).

<sup>18</sup> See H.R. REP. NO. 87-1559, at 1 (1962) (“House Report”).

<sup>19</sup> Senate Report at 1880 (emphasis added).

ACRA, had nothing to do with digital television. Under *Chevron*, there is no room for interpretive latitude by the FCC. The Commission should reconsider its decision at this time.

**B. The Commission Has Expressly Recognized the Limitations of Its Authority Under ACRA.**

The Commission itself has previously declined to view its authority under ACRA as expansive. In the mid-1980s, Sanyo Manufacturing Corporation sought to market a video display device for personal computers, video tape recorders, TV games and other devices and requested a waiver of the Commission's Rule implementing ACRA (the device responded to signals on VHF Channels 3 and 4 only). The Commission viewed as the "central question" whether the device and the signals it received were within the scope of ACRA. In answering this question, the Commission noted that the signal sources used by the video display device were products of technologies that did not exist at the time that the statute was enacted. The Commission stressed that the concern of Congress in enacting ACRA was to "remedy a situation where the UHF television allocations were progressively being rendered less useful because fewer and fewer television sets could receive anything but the VHF channels."<sup>20</sup> Accordingly, the Commission concluded that the device and the signals involved fell outside the scope of ACRA because "we are not dealing with a technology that poses any real threat to use of UHF spectrum."<sup>21</sup>

Similarly, as Commissioner Furchtgott-Roth observed in his separate statement, the digital tuner technology of today did not exist in 1962. A television receiver that is manufactured without the capability of receiving DTV signals does not pose any threat to UHF reception and, accordingly, falls outside the scope of ACRA.

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<sup>20</sup> *Sanyo Manufacturing Corp.*, 58 Rad. Reg. 2d (P & F) 719 (1985) (decision on reconsideration of *Sanyo Manufacturing Corp.*, 56 Rad. Reg. 2d (P & F) 681 (1984)).

<sup>21</sup> *Id.* at ¶ 7.



**C. The Courts Have Recognized the Limitations of the Commission's Authority Under ACRA.**

In *Electronic Industries Association Consumer Electronic Group v. FCC*, the United States Court of Appeals for the District of Columbia considered the Commission's scope of authority under ACRA.<sup>22</sup> Relying extensively on the Act's legislative history, which it described as "clearer than most," the court concluded that Congress left to the Commission the task of achieving a single goal: improving "UHF Service to make that band competitive with VHF."<sup>23</sup> In addition, the court also noted that the statute was only adopted after the Commission explicitly committed that it would "avoid extreme or unreasonable performance specifications," and "select standards which are in the realm of the average characteristics of UHF receivers available on the open market today."<sup>24</sup>

The court's interpretation of ACRA is consistent with the arguments Thomson presents in this Petition and confines the Commission's authority to a specific problem, a specific context and a specific time. The Commission's contrary construction here could not withstand judicial review.

**D. A Specific Statutory Directive is Necessary for the Commission To Legally Require That All Tuners Receive DTV Channels.**

Historically, when the FCC has imposed requirements on television receivers it has done so pursuant to specific statutory authority. For instance, the Television Decoder Circuitry Act of 1990 requires manufacturers to produce television sets capable of displaying closed-captioned television transmissions for the hearing impaired.<sup>25</sup> Similarly, the Telecommunications Act of 1996 requires that manufacturers include "v-chip" technology in their receivers.<sup>26</sup> Notably, legislation requiring that receivers have the capability to receive DTV signals was considered less than four years ago by the

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<sup>22</sup> 636 F.2d 689 (1980).

<sup>23</sup> *Id.* at 695.

<sup>24</sup> *Id.* at 696.

<sup>25</sup> 47 U.S.C. § 303(u).

<sup>26</sup> 47 U.S.C. § 303(x).



House Committee on Energy and Commerce. The Committee rejected the amendment on a 31-11 roll call vote.<sup>27</sup>

Even recently, former Chairman Kennard and proponents of a DTV tuner requirement have acknowledged that a specific statutory directive is necessary for the Commission to legally require that all tuners receive DTV channels. In a letter to Senator Ernest Hollings, Chairman of the Senate Committee on Commerce, Science and Transportation, dated January 19, 2001, former Chairman Kennard wrote: "Congress should amend the Communications Act to require that new television receivers above a certain screen size, e.g. 13 inches, include the capability to receive DTV signals."<sup>28</sup>

In testimony before the Senate Commerce, Science and Transportation Committee on March 1, 2001, the President and CEO of Paxson Communications stated: "We need a digital all Channel Receiver Act that would require that all television sets sold to the American public be capable of receiving both analog and digital signals."<sup>29</sup> Another proponent's testimony reads: "In 1962, Congress mandated UHF tuners in every set. Digital tuners should be mandated in every set in 2002."<sup>30</sup> Former Chairman Kennard and broadcasters would have no reason to call for new legislation if ACRA – existing law – truly provided the Commission with the authority necessary to impose a DTV tuner mandate.

Congress, the Commission, and the courts have interpreted ACRA as conveying nothing more than the specific authority to promote the viability of UHF broadcasting. Moreover, even among those who would like to read ACRA broadly, there is a recognition that in the absence of a specific statutory

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<sup>27</sup> House Comm. on Commerce, 105<sup>th</sup> Cong. Amendment to the Comm. Print of June 10, 1997 (offered by Rep. Markey).

<sup>28</sup> Letter from William E. Kennard, Chairman, FCC, to The Honorable Ernest Hollings, Chairman of the Senate Committee on Commerce, Science and Transportation, at 3 (dated Jan. 19, 2001).

<sup>29</sup> *Hearing on the Transition to Digital Television Before the Senate Comm. on Commerce, Science and Transportation*, 107<sup>th</sup> Cong. (2001) (written testimony of Jeff Sagansky, President and CEO, Paxson Communications Corporation).

<sup>30</sup> *Hearing on the Transition to Digital Television Before the Senate Comm. on Commerce, Science and Transportation*, 107<sup>th</sup> Cong. (2001) (written testimony of Ben Tucker, Executive Vice President for Broadcast Operations, Fisher Broadcasting).

directive addressing digital tuners, the Commission lacks authority to require that all tuners receive DTV channels. Consequently, the Commission's determination that it has the authority under ACRA to require that television receivers be capable of adequately receiving digital broadcast signals is misplaced and should be reversed on reconsideration.

**III. ASSUMING, ARGUENDO, THAT THE FCC HAS AUTHORITY TO IMPOSE A DTV TUNER REQUIREMENT, THE REPORT AND ORDER LACKS THE LEGALLY-REQUIRED JUSTIFICATION FOR ITS CHANGE IN POLICY.**

In its digital proceedings, the Commission twice declined to mandate the manufacture of "dual mode" television receivers, which are capable of receiving and decoding both NTSC and ATSC signals, citing the lack of a mandate under the ACRA.<sup>31</sup> It is well established that an administrative agency may not suddenly change prior policies without supplying "a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."<sup>32</sup>

Nonetheless, the FCC in its *Report and Order* not only determines that it has the authority to impose such a requirement, but does so without a scintilla of supporting analysis. Accordingly, even if the Commission had the legal authority to impose a DTV tuner mandate, which Thomson strongly believes it does not, its action in this instance was also arbitrary and capricious in violation of the Administrative Procedure Act.<sup>33</sup>

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<sup>31</sup> See Fifth Report and Order, 12 FCC Rcd 12809, 12855-6 (1997) (citing Third Report and Order, Third Further Notice of Proposed Rule Making, 7 FCC Rcd 6924, 6984 (1992)).

<sup>32</sup> Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 42 (1983). The United States Court of Appeals for the District of Columbia Circuit, addressing FCC action, has held: "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored..." Greater Boston TV Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970); see also, American Telephone & Telegraph Company v. FCC, 974 F.2d 1351 (D.C. Cir. 1992) (FCC acted arbitrarily when it failed to acknowledge a change in policy).

<sup>33</sup> See *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983), *supra*.

#### IV. CONCLUSION.

For the reasons set forth above, we respectfully ask the Commission to reconsider its determination that ACRA grants it the authority to require that television receivers be capable of adequately receiving DTV broadcast signals.

Respectfully submitted,

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